

of violations attributable to EAI and SBC by EAI contactor USS (in this case 200 (39 violations for EAI and 161 for SBC)). In this case, EAI's Total Billing Base is 1147.³⁰¹

301. Next, Comcast's 843 attachments³⁰² are divided by the Total Billing Base of 1147 to determine what share of charges are allocated to Comcast. In this case, the formula assigns 73.496% to Comcast.³⁰³ Adding the 5% markup to USS charges, EAI's calculation of Comcast's share of the \$22,258.25 invoice is 77.25%, or \$17,195.49.

302. The method EAI uses to assign charges to itself is different. EAI takes the number of violations USS assigns to EAI, in this case 39 and divides this by the Total Billing Base of 1147.³⁰⁴ Under this approach EAI is assigned just 3.4% of the total charges of the inspection, which is only \$2,941.98.

303. The invoice indicates the difference between Comcast's 77.25% and Entergy's 3.4% is attributable to SBC. To the extent that EAI is not requiring SBC to pay these charges, it is discriminatory in violation of 47 U.S.C. § 224(f).

304. Similarly, the April 19, 2003 EAI invoice to Alliance for the safety audit of Plumerville reflects an amount due of \$7,711.09.³⁰⁵ The backup shows that the original USS invoiced amount to EAI for the inspection work and expenses was \$7,708.11.

305. EAI calculated Alliance's share of the inspection charges by dividing Alliance's 1,976 attachments³⁰⁶ by the Total Billing Base of 2,074 resulting in Alliance being assessed 95.275% of the cost. EAI's share of the charges-- 60 violations works out to be 2.893%, or

³⁰¹ Comcast Allocation Invoice (Exh. 32).

³⁰² As discussed earlier, USS' attachment count is seriously flawed itself and materially overstates attachments. Comcast, in fact, has attachments on only 516 EAI poles of the 1122 inspected poles in Circuit G925. See ¶¶ 219-224, *infra*.

³⁰³ Comcast Allocation Invoice (Exh. 32). This methodology is patently unfair as it ignores the fact that Comcast does not even attach to about 54% of the poles inspected by USS. See ¶¶ 318-325.

³⁰⁴ The disproportionately low number of EAI clearance violations arises because USS arbitrarily assigns responsibility for the vast majority to Comcast. See ¶¶ 277-283.

³⁰⁵ Alliance Allocation Invoice dated March 20, 2003, attached hereto as Exhibit 33.

\$223.³⁰⁷ After EAI added in the 5% overhead charge, Alliance's charges actually exceeded 100% of USS' charges.

306. Just as with Comcast and Alliance, Entergy is subjecting WEHCO to the same unjust and unreasonable allocation formula. Although the itemized invoices WEHCO received do not break down the exact number of violations and percentage of inspections costs EAI attributes to itself, it appears that EAI is charging WEHCO 75% or more of the inspection charges.³⁰⁸

307. Through this formula, EAI is requiring Complainants to pay charges disproportionate to the benefits they derive from USS' inspection. This is an unjust and unreasonable term or condition in violation of 47 U.S.C. § 224.³⁰⁹

B. Entergy May Not Recover Directly Costs USS' Inspections Conducted One Year Or More Following Cable Installations

308. The flaws in EAI's allocation formula notwithstanding, it is unjust and unreasonable to charge attachers for routine inspections (i.e., inspections conducted more than one year after an installation) for which costs are recovered through pole rents.³¹⁰

309. In most cases, USS' inspections occurred one year or more after the Complainants installed their facilities on Entergy's poles. The following paragraphs chart the installation and inspection time lines.

310. Comcast:

a. Upgrade began January 1999 and completed in January 2001.

³⁰⁶ As noted above, it is likely that this attachment count is substantially overstated.

³⁰⁷ Alliance Allocation Invoice (Exh. 33).

³⁰⁸ See WEHCO Allocation Invoice dated August 30, 2004, attached hereto as Exhibit 34. Unlike Comcast, Alliance and WEHCO, Cox is assigned 100% of the inspections charges.

³⁰⁹ *Cable Texas, Inc. v. Entergy Services*, 14 FCC Rcd. 6647 (1999); *Newport News Cablevision, Ltd. v. Virginia Power*, 7 FCC Rcd. 2610 (1992); *First Commonwealth Communications v. Virginia Electric Power Co.*, 7 FCC Rcd. 2610 (1992).

³¹⁰ See *Knology*, 18 FCC Rcd. 24615, at ¶¶ 28-35.

- b. USS inspections commenced on or about February 2002.³¹¹
- c. USS inspections took place between one and four years after Comcast equipment was installed.³¹²

311. Alliance:

- a. Greenbrier constructed in 1998.
- b. Plumerville constructed in the 1970s.
- c. USS commenced inspections in early 2002.
- d. USS inspections took place 5 or more years following Alliance's equipment installation.

312. WEHCO:

- a. Searcy rebuild occurred between 1993 and 1995.
- b. Pine Bluff rebuild occurred between 1996 and 2000.
- c. USS commenced inspections in March 2004.
- d. USS inspections took place 4 to 11 years after equipment installation.

313. Cox:

- a. Magnolia, Malvern and Gurdon completed in 2003-2004.
- b. USS inspection commenced in 2002 and extended through upgrade.
- c. Russellville – Upgrade presently commencing.

314. Because Entergy/USS conducted these inspections more than one year after the Complainants installed their facilities, they are considered routine inspections.³¹³

³¹¹ On information and belief, USS conducted a "test audit" covering a small sample of Comcast facilities in late 2001.

³¹² Because the Comcast upgrade involved overlashing of only 30 percent of its strand, some 70 percent of the plant was not affected in any way by the upgrade. Thus, for most of the plant, the USS inspections occurred even more than four years after installation. Declaration of Marc Billingsley at ¶ 11 (Exh. 6).

³¹³ See *Knology*, 18 FCC 24615, at ¶¶ 28-35.

315. Upon information and belief, Entergy recovers costs associated with routine inspections through its annual pole attachment rental rate.

316. Moreover, a pole owner that uses an inspection to collect information beneficial to itself must recover the costs through annual pole attachment fees.³¹⁴

317. Entergy's attempt to recover these fees directly from Complainants as separate fees in addition to annual pole attachment rental rates is unjust, unreasonable and in violation of 47 U.S.C. § 224.

C. Entergy Is Unreasonably Inflating the Number Poles for Which It Is Charging Inspection Fees

1. Entergy is charging complainants to inspect poles to which they are not attached

318. Based on information and belief, Entergy is charging Complainants for inspections of other poles to which they are not attached.

319. For example, based on Entergy's December 12, 2003 invoice, Entergy alleges that Comcast has 843³¹⁵ attachments in Circuit G925, but charged Comcast for inspecting 1122 poles.³¹⁶

320. This is an unjust and unreasonable term or condition of attachment. Entergy may only charge Complainants for inspections for which they derive a benefit.³¹⁷ Complainants do not derive any benefit from inspections to poles to which they do not attach.

³¹⁴ See *Cable Television Ass'n of Georgia v. Georgia Power Co.*, 18 FCC Rcd. 16333, ¶ 18 (Aug. 8, 2003) ("[C]osts attendant to routine inspections of poles, which benefit all attachers, should be included in the maintenance costs account and allocated to each attacher in accordance with the Commission's formula."), *recon. denied*, 18 FCC Rcd. 22287 (Oct. 29, 2003).

³¹⁵ Declaration of Marc Billingsley at ¶ 58 (Exh. 6). Comcast believes it is only attached to 516 poles. As previously noted, an unresolved issue between Comcast and EAI is the number of attachments that Comcast has on EAI poles.

³¹⁶ See *id.*

³¹⁷ *Cable Texas, Inc. v. Entergy Services*, 14 FCC Rcd. 6647, at ¶ 13 (1999) (citing *Newport News Cablevision, Ltd. v. Virginia Power*, 7 FCC Rcd. 2610, at ¶ 9 (1992)); *First Commonwealth Communications v. Virginia Electric Power Co.*, 7 FCC Rcd. 2610, at ¶ 8 (1992).

2. Entergy is charging complainants to inspect SBC-owned poles

321. Based on information and belief, Entergy is charging Complainants for inspections of SBC owned poles.

322. In fact, Entergy has admitted to inspecting SBC poles in a letter dated June 4, 2003 (*see* Exhibit 23).

323. By letter dated June 4, 2003, Entergy explained to Comcast its process of inspecting—at the Complainant’s expense—poles that belong to SBC. Specifically, Entergy stated:

Although the vast majority of EAI’s distribution facilities are located on poles owned by EAI, some of its facilities are on joint use poles owned by SBC. EAI not only has the right but an obligation to inspect the space it owns on joint-use poles to insure, in part, that attachments made by Comcast to these poles are in compliance with the National Electrical Safety Code and EAI standards. This is so regardless of ownership.³¹⁸

324. Entergy has no legal or contractual right to inspect telephone utilities’ poles, much less bill cable for those inspections. Moreover, Complainants have independent relationships and pole attachment agreements with telephone utilities.³¹⁹ Those relationships and agreements, subject to the limitations of federal law, govern inspect and the cost recovery with respect to those poles.

325. Entergy’s requirement that Complainants pay USS’ charges to inspect other utilities’ poles is an unjust and unreasonable term or condition of attachment.³²⁰

D. Entergy’s Inspection Charges Are Contrary to the Parties’ Pole Attachment Agreements

³¹⁸ Letter from Wm. Webster Darling, Senior Counsel, Entergy, to Kyle Birch, Senior Counsel, Comcast, dated June 4, 2003 (Exh. 23).

³¹⁹ *See, e.g.*, Declaration of Marc Billingsley at ¶ 46 (Exh. 6).

³²⁰ *First Commonwealth Communications v. Virginia Electric Power Co.*, 7 FCC Rcd. 2610, at ¶ 8 (1992) (“An underlying principle of Commission regulation of pole attachments, based on Congressional mandate and judicial interpretation, is that costs incurred in regard to poles and their attachments which result in a benefit should be borne by the beneficiary.”).

326. The Pole Agreements between EAI and each of the Cable Operator Complainants contain an identical provision regarding the procedure for conducting pole inventory audits, including how the inventories are to be paid for. Section 7.2 of the EAI Pole Agreement provides:

Electric Company may at its option use a physical inventory in lieu of perpetual inventory. The cost of such physical inventory shall be shared equally among the participating companies.³²¹

327. EAI retained USS to conduct its inspections, including a physical inventory of attachments without the participation of any of the Complainants. Complainants were given no advance notice or opportunity to be involved in the selection of USS as the auditor, and Entergy and USS have both resisted Complainants' participation.³²²

328. The only "participating company" in the inventory is EAI. As such the Agreement requires EAI bear the entire cost of USS' inspection.

329. EAI's refusal to allow cable operators to participate in the audit and the selection of the contractor and EAI's requirement that Complainant pay USS' charges are unjust and unreasonable terms and conditions of 47 U.S.C. § 224.

E. EAI's Assessment of an Overhead Charge In Addition to the Inspection Charge is Unjust and Unreasonable

330. In addition to assigning an unreasonable percentage of the inspection costs to the Complainants, EAI is assessing an unlawful overhead charge ranging from five to eight percent (5%-8%) of the inspections costs allocated to each Complainant.

³²¹ EAI Pole Agreements at § 7.2 (Exh. 2A-2D).

³²² Declaration of Bennett Hooks at ¶ 13 (Exh. 4); Declaration of Charlotte Dial at ¶ 18 (Exh. 3).

331. Specifically, EAI assessed Comcast an “overhead” charge of five percent, which increased to eight percent in 2004. Cumulatively, Comcast has been charged approximately \$75,000 in such overhead charges through February 2004.³²³

332. Similarly, EAI added an additional five percent (5%) to Alliance’s charges, increasing the charges to Alliance by \$12,000.³²⁴

333. Through the end of 2003, EAI imposed a five percent charge on Cox, increasing its final invoice amount by \$13,000.³²⁵ EAI has since increased its overhead charge to eight percent (8%).³²⁶

334. WEHCO has also experienced an eight percent (8%) overhead charge, resulting in an additional \$1,127.97 to be added to be added to the two invoices that WEHCO has received to date.³²⁷

335. Complainants currently pay EAI an annual pole attachment rental fee in order to attach to EAI’s facilities.³²⁸ EAI’s overhead costs are recovered in the general and administrative carrying component of the FCC formula and recovered through the annual rent.

336. By adding an administrative surcharge to Complainants’ invoices, EAI is attempting to double recover administrative expenses.

337. This is unjust, unreasonable and in violation of 47 U.S.C. § 224.³²⁹

³²³ Declaration of Marc Billingsley at ¶ 62 (Exh. 6).

³²⁴ Declaration of Bennett Hooks at ¶ 18 (Exh. 4). Since Alliance has been charge approximately \$250,000 for the cost of the inspections, approximately \$12,000 has been assessed on Alliance for overhead charges. *Id.*

³²⁵ Declaration of Jeff Gould at ¶ 18 (Exh. 3). Since Cox has been charge approximately \$289,121.52 for the cost of the inspections, over \$13,700 has been assessed on Cox for overhead charges. *Id.*

³²⁶ Declaration of Jeff Gould at ¶ 18 (Exh. 3).

³²⁷ See WEHCO Allocation Invoice (Exh. 34); WEHCO Invoice Detail for Invoice #2014801, attached hereto as Exhibit 35.

³²⁸ Declaration of Marc Billingsley at ¶ 6 (Exh. 6); Declaration of Bennett Hooks at ¶ 6 (Exh. 4); Declaration of Jeff Gould at ¶ 5 (Exh. 3); Declaration of Charlotte Dial at ¶ 4 (Exh. 5).

³²⁹ See *Cable Television Ass’n of Georgia v. Georgia Power Co.*, 18 FCC Rcd. 16333, ¶ 18 (Aug. 8, 2003), *recon. denied*, 18 FCC Rcd. 22287 (Oct. 29, 2003).

F. EAI Failed To Assure That The Costs Associated With The Inspections Were Just And Reasonable

338. As a result, of Entergy/USS' unlawful billing practices, Complainants have been invoiced average rate of approximately \$39 per pole for inspections.³³⁰ This amount is well above the prevailing market cost for pole inspections and above what is just and reasonable which, as discussed in detail below, should be between \$4.88 and \$5.71 per attacher per EAI pole to which a cable operator is actually attached, to the extent any direct charge is permissible at all.

1. Unlawful charges related to USS' billing practices and training sessions

339. For example, the parties have met on several occasions to address engineering and billing issues. For each of these meeting, Entergy/USS bills Complainants for expenses USS incurs to attend. Improper charges include USS' representatives' travel expenses including charging Complainants over 500 miles in a single day.³³¹

340. Complainants have objected to paying the expenses USS incurs to defend the quality of its inspections or to justify its bills. USS' Tony Wagoner's only response is that he was required to invoice cable under the terms of USS' agreement with Entergy.³³²

341. Similarly, USS invoices cable operators for "training sessions." In essence, these "training sessions," consist of a lecture on its USS' flawed approach to aerial plant engineering and the inspection process.³³³

³³⁰ Comcast has been billed approximately \$1.5 million for the USS inspection of Comcast's 38,691 poles (this is the last agreed upon number of attachments as indicated in EAI's 2003 invoice) in the Comcast Service Area. Similarly, Alliance has been charged approximately \$250,000 for USS inspection of about 8,610 poles in the Alliance Service Area. Cox has been charged approximately \$289,000 for the inspection of 3,900 poles and WEHCO has been charged approximately \$15,000 for the inspection of 1,300 poles. These areas represent the vast majority of inspections billed for to date and result in an average per pole inspection charge in excess of \$39.00.

³³¹ See, e.g., Declaration of Marc Billingsley at ¶ 64 (Exh. 6); Alliance Allocation Invoice (Exh. 33).

³³² Declaration of Bennett Hooks at ¶ 35 (Exh. 4).

³³³ Declaration of Charlotte Dial at ¶ 21(Exh. 5). As noted, USS' practices were widely discredited by the FCC in

2. Unlawful charges for defective or duplicative work.

342. Entergy/USS bills Complainants for each inspection of a pole, even if the repeat inspection is due to USS' flawed or defective work.

343. This is an unjust and unreasonable terms or conditions of attachment. The Commission has recognized that utilities in general —and EAI in particular — have an obligation to assure that inspection costs imposed by third party contractors are just and reasonable.³³⁴ Further, the Commission has affirmatively stated that a pole owner may not require an attacher to pay for duplicate or defective work.³³⁵

3. Unreasonable equipment charges

344. A significant portion of USS' inspection charges is associated with daily use of digital cameras, GPS units, and radios.³³⁶

345. These are unjust and unreasonable terms and conditions of attachment. The information USS gathers with the digital cameras, GPS Units and radios directly benefit EAI, and not Complainants.

4. Mileage charges and personal expenses

346. In addition, Entergy/USS bill Complainants for USS' inspectors' mileage charges, which in some instances are more than 500 miles in a single day.

347. For example, one of Alliance's invoices includes charges for 538 miles USS' Russell Buckner alleged traveled on July 31, 2002 and a \$35 "per diem/meals" charge.³³⁷ However, the invoice does not indicate that Russell Buckner conducted any inspection or

its *Knology* decision just last year. *See Knology*, 18 FCC Rcd. 24615, at ¶¶ 28-35.

³³⁴ *Cable Texas*, 14 FCC Rcd. 6647, at ¶ 14.

³³⁵ *Cavalier Telephone, LLC v. Virginia Electric and Power Company*, 15 FCC Rcd. 9563, ¶ 23 (2000).

³³⁶ *See, e.g.*, Comcast Allocation Invoice (Exh. 32); Alliance Allocation Invoice (Exh. 33); WEHCO Allocation Invoice (Exh. 34).

³³⁷ *See Alliance Allocation Invoice* (Exh. 33).

engineering work that day. In fact, USS' invoices indicate that Mr. Buckner conducted only 1.5 hours inspecting Alliance's attachments over the entire month of August and no time at all in July.³³⁸

348. Similarly, Entergy billed Comcast for 505 miles driven by "Project Facilitator" Carl Worthington on May 14, 2003.³³⁹

349. Invoices also show that USS personnel drove over 3,350 miles inspecting 920 poles in Circuit V350. Based on the industry average of 30 poles per mile, USS drove about 111 miles for every mile of pole it inspected in this Circuit.³⁴⁰

350. Similarly, Circuit G925 the invoices show that USS drove over 3,360 miles to inspect 1122 poles. That is approximately 112 miles driven for each mile of plant inspected.³⁴¹

351. These changes are but a few of a very long list of similar changes on invoices to all Complainants.

352. By comparison, Comcast and Cox contracts with UCI, another regional engineering firm. For the categories of labor provided by USS, UCI's are less, but include all mileage, equipment and *per diem* charges.³⁴²

353. These are unjust and unreasonable terms or conditions of attachment. The Commission has recognized that utilities in general —and EAI in particular — have an obligation to assure that inspection costs imposed by third party contractors are just and reasonable.³⁴³ Entergy may not disregard the reasonableness of USS' costs simply because it is passing these costs through to the Complainants.

³³⁸ See *id.*

³³⁹ See Comcast Invoice for Circuit V350, attached hereto as Exhibit 36.

³⁴⁰ See *id.*

³⁴¹ See Comcast Allocation Invoice (Exh. 32).

³⁴² Declaration of Marc Billingsley at ¶ 65 (Exh. 6).

³⁴³ *Cable Texas*, 14 FCC Rcd. 6647, at ¶ 14.

G. Commission Should Compel EAI To Adjust Complainants' Invoices To Reflect The Deductions And Adjustments Required By Law

354. *Cable Operator Complainants have struggled to obtain a complete set of itemized bills from EAI with regard to USS inspections beginning almost three years ago.*³⁴⁴ This is unjust and unreasonable.³⁴⁵

355. For example, Comcast, after literally a year's insistence, finally began receiving itemized bills in June 2003.³⁴⁶

356. Similarly, WEHCO and Cox did not receive any itemization or backup to the initial invoices sent to WEHCO by Entergy until numerous requests were made for such information.³⁴⁷

357. Because of EAI's efforts to hide its unlawful billing practices by withholding itemized billing information for the majority of work, it is not possible for Complainants to document precisely the amounts that each has been overcharged by EAI with regard to inspections conducted within one year of equipment installations.

358. For this reason, Complainants suggest two alternative methods for adjusting the amounts that EAI may charge for the USS inspections to the extent direct charges are permissible at all³⁴⁸: the first is labeled the "Competitive Rate Model" and the second is labeled the "Adjusted Share Model."

³⁴⁴ See, e.g., ¶¶ 106-107, 185-186.

³⁴⁵ *Knology*, 18 FCC Rcd. 24615, at ¶ 62. (Georgia Power was required to provide detailed billing information when requested).

³⁴⁶ See Declaration of Marc Billingsley at ¶ 37; Letter from Kyle Birch, Comcast Senior Counsel, Webster Darling, Entergy Senior Counsel, dated July 17, 2002 (Exh. 20); Letter from Mark Grimmet, Business Manager, Comcast to David B. Inman, Entergy, dated October 22, 2002 (Exh. 21); Letter from Kyle Birch, Comcast Senior Counsel, Webster Darling, Entergy Senior Counsel, dated February 26, 2003 (Exh. 22).

³⁴⁷ See Letter from Charlotte Dial, Administrative Manager, WEHCO, to Entergy Arkansas, Inc. dated September 30, 2004 (Exh. 13); Letter from Charlotte Dial, Administrative Manager, WEHCO, to Entergy Arkansas, Inc. dated October 27, 2004 (Exh. 14); Declaration of Jeff Gould ¶¶ 21-22 (Exh. 3).

³⁴⁸ Alliance, Comcast and WEHCO inspections charges were incurred more than one year *after* cable equipment was installed. *All* such routine inspection costs must be recovered through pole rent. See ¶¶ 308-317.

359. Under either approach, the proper per pole charge allocable to Complainants is remarkably close. The Competitive Rate Model results in a per-pole charge of \$4.88 for Complainants' share, while the Adjusted Share Approach results in a modestly higher share range from \$5.15 to \$5.81 per pole for the Circuits analyzed.³⁴⁹

1. Competitive Rate Model

360. One of the fundamental errors in EAI's approach to contracting with USS to conduct the safety audits of Complainants' systems was EAI's failure to follow a commercially reasonable procedure in the selection process. It is unjust and unreasonable to disregard the reasonableness inspection charges that are passed through to attachers.³⁵⁰

361. At a minimum, it would have been commercially reasonable for Entergy to issue a Request for Proposals and to solicit competitive bids among qualified contractors. Failure to do so has contributed to the inflated charges Entergy is passing through from USS.

362. While it may be too late to pursue this course now, the Cable Operator Complainants have attempted to determine what a competitive bid might have been for the work that USS agreed to in the USS/EAI contract.

363. Comcast earlier this year requested a bid from a qualified regional engineering firm called Utility Consultants, Inc. ("UCI") to accomplish the cable relevant functions identified from the USS/EAI contract for the Targeted Communities. On June 14, 2004, UCI issued its proposal for the work performed by USS at a rate of \$14.63 per pole.³⁵¹ This per-pole rate is all-inclusive for the measurement of the lowest EAI facilities, cable and telephone and no additional charges like daily equipment rental fees, *per diem* or mileage are assessed by UCI.

³⁴⁹ In some cases, depending on the number of attachers and the specific unreasonable expenses to be deducted, this amount could be less.

³⁵⁰ See *Cable Texas*, 14 FCC Rcd. 6647, at ¶ 14.

³⁵¹ Declaration of Marc Billingsley at ¶ 65 (Exh. 6).

364. In light of the multiple and common benefits EAI, SBC and other attachers derive from measuring these clearances to identify violations, at a minimum, this rate should be divided among the attachers to each pole to identify the amount that each Complainant should be responsible for.

365. EAI/USS' documentation indicates that there are at least three—and in some cases more—attachers on the various EAI poles that Comcast attaches to. If this proposed Competitive Rate approach is applied, the Commission should—as it does in setting rates for telecommunication attachments—assume there are three attachers per pole in rural areas and five in urbanized areas in each of the Targeted Communities for which direct inspection charges are permitted.³⁵² EAI should charge each of the Complainants no more than its *pro rata* share of the \$14.63 per pole charge based on this average number of attachers.

366. For example, if any inspections can be charged directly to Alliance, and if it were assumed that Alliance was in an entirely rural area (which it is not), and the average number of attachers per EAI pole is determined to be three in the Alliance Service Area, then Alliance should be billed no more than \$4.88 for each directly chargeable Alliance occupied EAI poles.

367. However, EAI is not entitled to any reimbursement for inspections SBC-owned poles or any EAI poles on which a Complainant has no attachment. Payment of pole rents and any amounts calculated in this fashion (where appropriate) for each Complainant Service Area constitutes the full and complete satisfaction of any amounts owed by Complainants to EAI for the USS inspections and related expenses.

2. Adjusted Share Model

³⁵² See *Amendment of Commission's Rules and Policies Governing Pole Attachments*, 16 FCC Rcd. 12103, at ¶¶ 71-72 (2001). Alternatively, the Commission could require EAI to produce the existing USS worksheets documenting the identities of attachers on each pole to which one of the Complainants is attached. From this data relevant averages for number of attachers could be determined. However, Complainants are willing to accept the FCC presumptions for efficiency's sake.

368. This approach sets forth a methodology for adjusting the actual invoices (to the extent properly charged to cable at all) to eliminate all improper charges and to assign each Complainant only its appropriate share of such charge in recognition of the common costs and benefits accrued by EAI and SBC from the inspections.

369. As noted earlier, because EAI is in possession of the relevant billing information as well as pole ownership, the burden is on EAI to produce all information necessary to calculate each Complainant's share of cost under this approach.³⁵³

370. The Adjusted Share Model requires that the following deductions be made from the average per-pole charge billed by USS/EAI for each of the Targeted Communities:

- a) Deduct all daily equipment (i.e. GPS, digital camera and radio) charges assessed on any bill;
- b) Deduct all mileage charges;
- c) Deduct all *per diem*, lodging and meal charges;
- d) Deduct all "overhead" or markup charges (typically 5 to 8 percent of the USS invoices);
- e) Deduct any charges attributable to responding to Complainants' questions regarding EAI and/or USS invoices or arising from itemizing such invoices;
- f) Deduct all charges that are attributable to the defective pole inventory audit conducted by USS and EAI in violation of the procedures set forth in the Pole Attachment Agreements (suggest \$2.17 per pole as noted),³⁵⁴ and

³⁵³ However, in the absence of actual reliable per-pole attacher data, the Commission should use the default number of entities presumption used in setting rates for telecommunications attachments.

³⁵⁴ For sake of convenience, the Commission should look to the per-pole charge it approved in 1999 for the Entergy pole inventory audit conducted in 1996. See *Cable Texas*, 14 FCC Rcd. 6647, at ¶ 16. The FCC determined that \$1.40 per pole was a reasonable amount to charge for such a pole audit. Adjusting for inflation (assumed

- g) Deduct the average per pole charge completely for any poles owned by parties other than EAI (i.e. SBC) and for poles upon which Complainants have no attachments.

371. For example, EAI charged Comcast \$20,257.86 for Circuit V350.³⁵⁵ Under this Model, \$2,237.61 in equipment charges (digital radios, GPS, radios), mileage, meals and *per diem* would be deducted.³⁵⁶ This leaves \$18,020.25. An additional \$2.17 per pole is deducted (for 920 poles this is a further reduction of \$1,996.40) to remove any pole inventory charges from the share billed to Complainants.

372. The new subtotal is \$16,023.85, which can be expressed as a per pole charge of \$17.42 for each of the 920 poles inspected.³⁵⁷

373. Since Comcast should not be charged any amount for inspections of non EAI poles (SBC poles) or for EAI poles upon which Comcast has no attachments, such inapplicable poles must be removed from the 920 total poles inspected in the Circuit.

374. In fact, Comcast is attached to 550 EAI poles of the 920 poles inspected by USS in the Circuit.³⁵⁸ Comcast could be appropriately charged its *pro rata* share of the \$17.42 for these 550 poles based on the average number of attaching entities on the relevant poles in the Circuit, including EAI and SBC. Assuming that all areas are rural and that there is an average of three attachers on the relevant poles then Comcast's share per pole is \$5.81 or approximately \$3,195.50. Thus, because EIA has invoiced Comcast \$11,156.73 for inspecting Circuit V350, Comcast would have been overcharged by approximately \$7,961.23 if this inspection were chargeable to Comcast (which it is not).

accumulating at 5 percent annually) this per pole charge would now be approximately \$2.17 per pole.

³⁵⁵ See Exhibit 36. Again, this invoice is used for illustration only because the charges all were incurred for inspections in March and April 2003. Since this is more than two years after the last of the Comcast upgrade was completed, amounts attributable to these inspections must be recovered through annual pole rent.

³⁵⁶ See Comcast Allocation Invoice (Exh. 32).

³⁵⁷ \$17.42 is the quotient of \$16,023.85 divided by 920 (the number of poles inspected in the Circuit).

³⁵⁸ Declaration of Marc Billingsley ¶ 69 (Exh. 6).

H. EAI is Unreasonably Compelling Complainants to Pay to Correct EAI's and other Attachers' Violations as well as Conditions Previously Allowed by EAI

375. Entergy is requiring Complainants to correct the preexisting safety violations of other attachers. This is unjust and unreasonable.³⁵⁹

376. A large portion of the alleged "violations" attributed to the Complainants stem from strand clearance issues. For example, to date, USS has identified approximately 45,013 violations in the Comcast Service Area. Of these violations, 18,870 relate to strand clearance violations of the NESC, which involve alleged inadequate clearances (in most cases) between EAI conductors and equipment and Comcast, or Comcast and a telephone attachment below Comcast's strand.³⁶⁰

377. It is unreasonable for Complainants to be assigned responsibility for correcting these alleged clearance issues (assuming there is an actual violation to begin with).³⁶¹ There is no evidence that Complainants caused such clearance issues and, indeed, it is far more likely that EAI or the telephone utility caused the violations.

378. It is unjust and unreasonable for EAI to require Complainants to pay for the cost of the repair of all strand clearance violations where it cannot be demonstrated that Complainants caused the violation.

X. RELIEF REQUESTED

379. Based on foregoing, Complainants respectfully request the Commission to:

- a. declare the permitting freeze to be an unlawful and discriminatory denial of access in violation of 47 U.S.C. § 224 and 47 C.F.R. § 1.1403(a) and direct

³⁵⁹ *Cavalier Tele., LLC v. Virginia Elec. and Power Co.*, 15 FCC Rcd. 9563, at ¶ 16 (2000), *vacated by settlement, Cavalier Telephone Settlement Order*, 17 FCC Rcd. 24414 (2002) (stating the vacatur did "not reflect any disagreement with or reconsideration of any of the findings or conclusions contained" in the original order issued in 2000); *see also, Knology*, 18 FCC Rcd. 24615, at ¶ 40.

³⁶⁰ Harrelson Report at pp. 19-21 (Exh. 15).

EAI to immediately begin processing Complainants applications for pole attachments;

- b. declare that EAI's attempts to charge Complainants for an excessive number of attachments by inflating Complainants' invoices with phantom attachments to be an unjust, unreasonable and discriminatory term and condition of attachment in violation of 47 U.S.C. § 224;
- c. declare that EAI's failure to allocate inspections cost equitably among all attachers to reflect joint benefit to be an unjust, unreasonable and discriminatory term and condition of attachment in violation of 47 U.S.C. § 224 and Commission precedent;
- d. declare that EAI inspections that took place more than one year after the rebuild or construction of the system are untimely and directly charging Complainants for them is an unjust, unreasonable and discriminatory term of attachment under 47 U.S.C. § 224;
- e. direct EAI to refund to Complainants amounts paid for EAI inspections that took place more than one year after the rebuild or construction of the system;
- f. declare EAI's formula for allocating inspection costs to be an unjust, unreasonable and discriminatory term and condition of attachment under 47 U.S.C. § 224;
- g. declare that EAI's attempt to charge Complainants for inspection of poles to which Complainants do not attach to be an unjust, unreasonable and discriminatory term and condition of attachment under 47 U.S.C. § 224;

³⁶¹ USS/EAI refuse to acknowledge the NESC grandfathering rules and have misapplied numerous other rules resulting in citations of thousands of violations where none exist. *See* Section VIII, *supra*.

- h. declare that EAI's attempt to charge Complainants for inspection of poles that EAI does not own or control to be an unjust, unreasonable and discriminatory term and condition of attachment under 47 U.S.C. § 224;
- i. declare that the EAI Pole Agreements bar Entergy from billing Complainants for the cost of the defective pole counts conducted by USS and direct EAI to refund to Complainants amounts paid for of such pole counts;
- j. declare all overhead charges imposed on Complainants to be an unjust, unreasonable and discriminatory term and condition on attachment in violation of 47 U.S.C. § 224 and direct EAI to refund all overhead charges paid by Complainants;
- k. declare the costs associated with the EAI inspections are unjust, unreasonable and discriminatory in violation of 47 U.S.C. § 224 and direct EAI to cease invoicing Complainants for such inspections;
- l. declare that EAI's attempt to require Complainants to pay for pre-existing safety violations of other attachers to be an unjust, unreasonable and discriminatory term and condition of attachment under 47 U.S.C. § 224;
- m. declare EAI's construction standards that exceed the requirements set forth in the NESC to be unjust, unreasonable and discriminatory terms and conditions on attachment and in violation of 47 U.S.C. § 224;
- n. declare that EAI must notify cable operators of all modifications to pole plant as required under federal law and 47 U.S.C. § 224;

- o. direct EAI and Complainants to adhere to the safety standards set forth in the NESC, including the relevant *grandfathering provisions, for their attachments* in the state of Arkansas;
- p. declare that EAI's failure to enforce uniform safety requirements upon all telephone company attachers or itself is an unjust, unreasonable and discriminatory term and condition of attachment in violation of 47 U.S.C. § 224;
- q. direct EAI to refund to Complainants all unlawful inspection and related charges in a manner consistent with this Complaint;
- r. reimburse Complainants for all out-of pocket expenses incurred due to labor, materials and engineering contractor costs to address Entergy's concerns and conduct a re-audit of Complainants' systems;
- s. award Complainants consequential damages for loss of subscribers due to the EAI's unlawful permitting freeze; and
- t. grant Complainants such other relief the Commission deems just, reasonable and proper.

Respectfully submitted,

**CABLE TELECOMMUNICATIONS
ASSOCIATION OF ARKANSAS;
COMCAST OF ARKANSAS, INC.;
BUFORD COMMUNICATIONS I, L.P. D/B/A
ALLIANCE COMMUNICATIONS NETWORK;
WEHCO VIDEO, INC.; AND TCA CABLE
PARTNERS D/B/A COX COMMUNICATIONS**



By their Attorneys:

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February 18, 2005

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of

CABLE TELECOMMUNICATIONS
ASSOCIATION OF ARKANSAS;
COMCAST OF ARKANSAS, INC.;
BUFORD COMMUNICATIONS I, L.P. d/b/a
ALLIANCE COMMUNICATIONS
NETWORK; WEHCO VIDEO, INC.; and
TCA CABLE PARTNERS d/b/a COX
COMMUNICATIONS,

Complainants

v.

ENTERGY ARKANSAS, INC.

Respondent.

File No. _____

To: Enforcement Bureau
Federal Communications Commission

DECLARATION OF RITA TEWARI

**ARKANSAS CABLE TELECOMMUNICATIONS
ASSOCIATION; COMCAST OF ARKANSAS,
INC.; BUFORD COMMUNICATIONS I, L.P.
D/B/A ALLIANCE COMMUNICATIONS
NETWORK; WEHCO VIDEO, INC.; AND
TCA CABLE PARTNERS D/B/A COX
COMMUNICATIONS**

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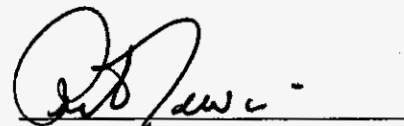
DECLARATION OF RITA TEWARI

I, Rita Tewari, hereby declare:

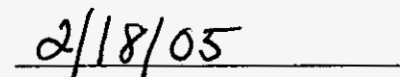
1. As counsel to the Arkansas Cable Telecommunications Association; Comcast of Arkansas, Inc.; Buford Communications I, L.P. d/b/a Alliance Communications Network; WEHCO Video, Inc.; and TCA Cable Partners d/b/a Cox Communications, Complainants in this proceeding, I am familiar with the factual matters included in this Complaint.

2. I was responsible for and oversaw the preparation of the above-captioned Complaint. I verify that the Complaint is true and accurate to the best of my knowledge, information and belief.

I declare under the penalty of perjury of the laws of the United States that the foregoing Declaration is true and correct.



RITA TEWARI



Date

CERTIFICATE OF SERVICE

I, Fariba Naim, hereby certify that, on this 18thst day of February 2005, copies of the foregoing were served in the manner indicated below, to the following:

Shirley Fujimoto (HAND DELIVERY)

Erika Olsen

McDermott, Will & Emery

600 13th Street, NW

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Wm. Webster Darling (FedEx)

Janan Honeysuckle

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Federal Energy Regulatory Commission (US MAIL)

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Arkansas Public Service Commission (US MAIL)

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Little Rock, Arkansas 72201

A handwritten signature in black ink, appearing to read 'Fariba Naim', written over a horizontal line.

Fariba Naim